



What are servitudes and how do they work?

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Most persons (natural and juristic) encounter the term ‘servitude’ upon purchasing a property and even then, are left confused as to what a servitude means.

A servitude is described as a limited real right attached to the movable and/or immovable property (hereinafter ‘property’) of an individual which awards the beneficiary the limited real right and specific entitlements to the use and enjoyment over the property. The existence of servitudes impose restrictions on the rights, powers, and autonomy of another individual.¹

There are two types of servitudes namely personal and praedial servitudes:

Personal servitudes

- Personal servitudes are created in favour of persons over property and confer benefits in favour of the holder of the servient property (property that is used for the benefit of another property). The identity of the person receiving the benefit is of utmost importance in this instance.
- This type of servitude cannot be transferred and ceases to exist upon the death of a natural person or the dissolution of a juristic person, of if the beneficiary waives or renounces his/her rights.

¹ Glaffer Investments (Pty) Ltd v Minister of Water Affairs and Forestry 2000 (4) SA 822 at 828F.

- Examples of personal servitudes include:
 - Usufructs – the right to use, enjoy and gather the fruits of a thing to which the usufruct relates.
 - Usus – resembles that of a usufruct, however the right to use, enjoyment and gathering of fruits is more restricted.
 - Habitatio – the holder has the right to occupy a specific portion of a property (e.g., a building or farm) and the right to grant a lease or sub-lease to another.

Praedial servitudes

- A praedial servitude is created over one property (the “servient tenement”) in favour of another property (the “dominant tenement”) regardless of the identity of the owners of either property.
- Can be subdivided into two categories, namely rural and urban servitudes.
- Rural servitudes include various rights of way whereas urban servitudes include the right of support, a right to a view, etc.
- This form of servitude stems from an agreement between the owner of the dominant property and the owner of the servient property wherein the extent of the servitudinal rights, the consideration for and the duration of the existence of the servitude is determined.²
- Examples of praedial servitudes include Rights of way- the right to walk/drive across another person’s land; Water servitudes- the right to draw water from the servient land and to subsequently transport the water by means of furrows/pipes; etc.

A servitude is created and recognised in South African Law by way of registration in the Deeds Office against the Title Deed of the servient and dominant property.³ *Eichelgruen v Two Nine Eight South Ridge*⁴ confirmed that the inclusion of a servitude in a Title Deed is sufficient proof of the existence of the servitude and remains undisputable until the deed is rectified.

Servitudes are primarily in existence for an unlimited duration. A servitude may however be terminated upon the expiration of the period for which the servitude was granted, or the fulfilment of a resolutive condition; agreement between the parties; death of the usufructuary or the registration of transfer of a property where the owner and the usufructuary agreed to dispose of the property, free of the personal servitude.

Registration of a servitude over a property, results in the owner of the property being unable to exercise his/ her real right and entitlement to the property to the fullest extent. The existence of a servitude implies that the property does not fully serve the owner however the burden placed on the property owner should not exist beyond the express or implied terms of the servitude.

The relationship between a servitude holder and the owner of the servient property raises numerous issues. Servitudes create conflict as more than one person enjoys the simultaneous specified use and

² Silberberg H The Law of Property (1975) 289.

³ *Worman v Hughes and Others* 1948 (3) SA 495 (A) at 502.

⁴ *Eichelgruen v Two Nine Eight South Ridge Road (Pty) Ltd* 1976 (2) SA 678 (D).



rights over the same property. The dominant landowner may only use his/ her property as the servitude dictates, provided that rights are exercised in a reasonable manner respectfully and with due caution and regard for the rights of the servient owner.

Numerous remedies may be employed to resolve conflict arising from the exercise of the servitudinal rights:

- In most instances the servient landowner would apply for an interdict. To succeed with an application for an interdict, the landowner must be capable of proving that he/she has a clear right which is constantly being interfered with to the detriment of the landowner and there is no alternative remedy which may provide relief.
- The landowner may alternatively rely on a declaration of rights application. He/she must however be capable of proving that there is an existing right or obligation to a property and there is a dispute which exists regarding the said property. The applicant must convince the court that the failure to an order declaring the rights will be to this detriment.

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